



FILE COPY

Office - Supreme Court, U. S.

JAN 29 1945

CHARLES ELMOORE OGDEN  
CLERK

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944.

**No. 377**

PRECISION INSTRUMENT MANUFACTURING COM-  
PANY, KENNETH R. LARSON, AND SNAP-ON TOOLS  
CORPORATION,

*Petitioners;*

vs.

AUTOMOTIVE MAINTENANCE MACHINERY  
COMPANY,

*Respondent.*

**REPLY BRIEF FOR PETITIONERS.**

WILL FREEMAN,  
CASPER W. OOMS,  
*Attorneys for Petitioners.*

January, 1945.



## TABLE OF CONTENTS.

	PAGE
The Independent Legal Counsel Consulted by Plaintiff Were Not Apprised of the Facts Which Plaintiff Knew When the Settlement Was Effected.....	2
The Circuit Court of Appeals Too Ignored the Confirmatory Evidence of Thomasma's Story.....	4
The District Court Did Find That Plaintiff and Its Attorneys Knew of Larson's Perjury and the Circuit Court of Appeals Expressly Held That They Were Morally Certain Thereof.....	6
Plaintiff's Analysis of the Opinion of the Circuit Court of Appeals is Neither Accurate Nor Complete.....	9
Plaintiff's Unnecessary Concern With the Asserted Fairness of the Contracts in Suit is Untimely and Presented as a Diversion From the Issue of This Case .....	14
Plaintiff's Argument That There Was No Fraud in Larson's Original Patent Application Contradicts Its Conduct During the Settlement of the Interference .....	17
Whether or Not There Were Threats, Promises Not to Prosecute, Agreements To Suppress Evidence, It Is Clear That Plaintiff Was Guilty of Unclean Hands .....	18
The Authorities Cited by Plaintiff Are Not Pertinent..	21
Conclusion .....	28

## ALPHABETICAL LIST OF AUTHORITIES.

Carpenters' Union v. Citizens Committee, 333 Ill. 225.	26
Duncan v. Dazey, 318 Ill. 500, 524-525.	26
Fagan v. Rootberg, 320 Ill. 586.	26
Leo Feist v. Young, 138 F. (2d) 972.	24
Ford v. Caspers, 128 F. (2d) 884.	26
Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co., 95 F. (2d) 978.	21
Herrick v. Lunch, 150 Ill. 283.	25, 26
Hunter v. Troup, 315 Ill. 293, 302.	23
Kapalos et al. v. Ganas, 242 Ill. App. 302.	25, 26
Kennedy v. Hazelton, 128 U. S. 667; 672.	27
Keystone Driller v. General Excavator Co., 290 U. S. 240.	26, 27
Marbury v. Brooks, 7 Wheat. (20 U. S.) 556.	23
Osborn, "The Problem of Proof"	20
People v. Macauley, 230 Ill. 208, 213.	22
U. S. v. Crescent Amusement Co., 323 U. S. (Decided Dec. 11, 1944).	19
Woodall v. Peden, 274 Ill. 301.	25

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1944.

---

**No. 377**

---

PRECISION INSTRUMENT MANUFACTURING COM-  
PANY, KENNETH R. LARSON, AND SNAP-ON TOOLS  
CORPORATION,

*Petitioners,*

*vs.*

AUTOMOTIVE MAINTENANCE MACHINERY  
COMPANY,

*Respondent.*

---

**REPLY BRIEF FOR PETITIONERS.**

---

The brief of Respondent (plaintiff) glosses over the fundamental issues of this case, that plaintiff knew of Larson's perjury and used that knowledge in procuring the application which ripened into the Larson Patent and the contracts sued upon, and did nothing to bring that crime to the attention of the authorities. Plaintiff then seeks to justify the conclusions reached by the Circuit Court of Appeals by ignoring the facts which the Circuit Court of Appeals chose to ignore. The brief justifies counsel's conduct on the ground that independent legal advice was sought and followed in the course which plaintiff pursued. A short reply will meet those contentions.

**The Independent Legal Counsel Consulted by Plaintiff Were Not Apprised of the Facts Which Plaintiff Knew When the Settlement Was Effected.**

The Circuit Court of Appeals (R. 1214-1215) lays emphasis on the statement that plaintiff's attorney Fidler consulted an outside attorney on November 18, 1940, with respect to complaining about Larson's perjury, and was advised against it and told to take the matter up with Larson's attorney.

Fidler testified very perfunctorily as to what he told Mr. Thomas, whom he consulted on that date (R. 759-760), and he testified quite fully (R. 777-779; 792-793) as to his telephone consultation with Mr. Dunbar, who also testified with respect to the telephone conference (R. 824-827). It does not appear from any of this testimony that either counsel was provided with a fair and adequate version of the facts.

In any event, a great deal transpired between the time of these conferences and the settlement of the interference: Larson conceded priority, a concession to the falsity of his proofs (R. 519). Somebody for defendants told Fidler that Zimmerman was the inventor of the subject matter of the interference (R. 823). Lindsey learned enough facts to charge Albert in writing that he was "holding up the issuance of the Zimmerman patent without the slightest justification." (R. 1049)

Plaintiff would make it appear that Dunbar knew of Larson's offer to concede priority when he talked on the telephone with Fidler. Plaintiff says (Br. p. 10):

"The question is then whether the offer to concede priority was enough to lay respondent under an immediate duty to file an information against Larson and his supporting witnesses. *The answer is that lawyer Dunbar was consulted and advised against it.*" (Emphasis by plaintiff.)

Both Fidler's (R. 777-779, 792-793) and Dunbar's (R. 824-827) testimony will be searched fruitlessly for any hint that Fidler ever told Dunbar that Hobbs, whom Fidler had first talked to that same week, had offered Larson's concession of priority. Fidler himself testifies to no more than that he told Dunbar of Larson's proofs and Thomasma's contradictory affidavit, for Fidler says, "I had only Thomasma's word for the matter," (R. 778) and further,

"No, I merely gave to him the highlights, as you have called them, of that story, the contradictory—the points of contradiction between the Larson story and the Thomasma affidavit." (R. 792)

Thus, whatever doubts counsel for plaintiff might have entertained when Thomas was consulted on November 18 and Dunbar (by telephone) on December 7, had been thoroughly dispelled by the time Larson signed a concession of priority, used by the plaintiff to obtain the Zimmerman patent over Larson's earlier proofs.

Clearly, however, any doctrine which would permit counsel or a litigant to avoid liability for his conduct by taking counsel of another attorney would be dangerous. Neither the criminal law nor the principles governing civil liability recognize legal advice as justification or excuse for misconduct. A contrary doctrine would render legal advice a sanction more powerful than any legal doctrine. The doctrine is unthinkable.

Whatever the effect of legal advice upon the conduct of plaintiff in this case, the record is clear that the course pursued by plaintiff and its attorneys was not one counseled by either Thomas or Dunbar. Neither suggested or endorsed settlement of the interference, or the manner in which it was settled. Neither was asked whether there was warrant for reporting the perjury after Larson had



4  
confirmed it by his concession of priority. Neither had been asked with respect to the duty to report that perjury after Fidler had been told by his opponents that Zimmerman was the inventor. Whatever corroboration of Thomasma's story—if any corroboration were needed—was lacking when these counsel were consulted was amply supplied before the settlement was effected.

Any attempt to evade the simple legal duty of reporting the crime because of the advice of Thomasma and Dunbar on November 18 and December 7 fails when the occurrences of the last three weeks of December are recalled.

### **The Circuit Court of Appeals Too Ignored the Confirmatory Evidence of Thomasma's Story.**

Plaintiff's brief (pp. 2-3) quotes from the opinion where the Circuit Court of Appeals flatly said that Larson's pre-trial examination on March 27, 1943 and the pleadings of February, 1943 were "the only confirmatory evidence of Thomasma's story of which plaintiff had knowledge." The Court did add that even on that uncorroborated evidence, "plaintiff and its attorneys, of course, were morally certain that Thomasma's story was true." (R. 1220-1221).

The Circuit Court of Appeals thus completely ignored the effect of Larson's unqualified concession of priority, his signing the contract with plaintiff reciting that "Zimmerman is the prior inventor of the subject matter involved in said interference" (R. 915); Fidler's admission that "they had told us Zimmerman was the prior inventor" (R. 823) and the many other facts which confirmed indisputably plaintiff's knowledge of Larson's perjury.

When plaintiff proposed its findings (R. 1104-1116) it did not even propose a finding that plaintiff or its attorneys

did not know of this perjury by December 20, 1940 when the settlement was effected.

The Circuit Court of Appeals minimized the credibility of Thomasma's story by properly designating him as plaintiff's "traitorous former employee" (R. 1221) and mentioning Thomasma's "former disloyalty," implying that this man's bad character was such as to make his incredibly detailed and factual affidavit only a frail pillar for the prolonged "suspicion" which plaintiff was obstinately entertaining with respect to the truth of Larson's proofs.

As a matter of fact, the settlement was hardly effected by the plaintiff and defendants when Thomasma was restored to grace. The record contains numerous letters between Thomasma and his betrayed employer, Wacker, and plaintiff's attorney, Fidler, from April 1, 1941 to the time of the filing of this suit, and in eleven of these letters Thomasma is always addressed as "Dear George" (R. 949, 1021, 1023, 1025, 1026, 1028, 1031, 1034, 1036).

Wacker repeatedly assigned Thomasma the task of finding out what plaintiff's competitor, Precision, was doing (R. 949, 1024). Thomasma procured the information, suggested a meeting with Wacker and had it (R. 950, 1028). Wacker and Thomasma had luncheon together (R. 335-336). Thomasma called at Wacker's home (R. 553). Even Mrs. Thomasma was reporting on Precision's activities (R. 1101).

Thomasma at one time pertinently inquired, "I would like definite information regarding his (Wacker's) promise to me, thru Mr. Travis, last year" (Def. Ex. 46, R. 1035).

On April 22, 1942 Thomasma asked Wacker for a shaper "perhaps on a lease-lend basis" (R. 1030), and Wacker denied the request as impossible because of priority regulations (R. 1031-1032).

The suit was filed on June 15 and on Saturday evening, probably June 27, Fidler called on Thomasma at his home, gave him two hundred dollars cash and took a receipt for that money and for "One AMMCO Shaping Machine" which had been delivered a few days previously (R. 338-340; R. 1020).

**The District Court Did Find That Plaintiff and Its Attorneys Knew of Larson's Perjury and the Circuit Court of Appeals Expressly Held That They Were Morally Certain Thereof.**

Plaintiff does not dare argue that its attorneys did not know at the time of the settlement of the Larson-Zimmerman Interference that Larson's proofs were perjured. Plaintiff argues that defendants' contention that such knowledge existed "challenges the District Court's findings of facts".

Plaintiff proposed no finding that plaintiff or its attorneys lacked knowledge of the perjury at the time the interference was settled (R. 1104-1116) but merely that "Automotive and its attorneys did not at any time charge Larson or any of his witnesses with the crime of perjury", threaten them with the institution of prosecution therefor, promise to withhold the complaint, agree to suppress the evidence or otherwise coerce or threaten defendants (Proposed Findings 33-42; R. 1114-1115). These proposed findings were all refused.

Findings 10 and 11, which were entered (R. 1124), held that "if Larson's proofs in the Interference had been true, he would have proved priority of invention two or three years earlier than Zimmerman," and that Plaintiff's attorneys knew by December 20, 1940, "that Larson knew his Interference proofs were insufficient".

Although the only ground on which the proofs were ever attacked in the prolonged negotiations was their falsity, plaintiff now states (Br. pp. 9-10) that "other reasons could have existed for recognizing Zimmerman as the one entitled to the patent, *e.g.*, estoppel against Larson by reason of his delay in applying for patent and his being stimulated to do so upon learning of Zimmerman's wrench," quotes Fidler's letter written five months before the settlement calling attention to the fact that Larson claimed to have made his invention four years before he filed his application, which is the same letter in which Fidler expressed positive disbelief of Larson's dates (R. 1084-1085), and then refers to Fidler's testimony where he mentions his theory that Larson's work was an abandoned experiment (R. 813).

Any suggestion that Larson's proofs were vulnerable because they disclosed an abandoned experiment was abandoned long before the interference testimony was taken and plaintiff very properly concedes in its brief (p. 40) "However, we do not stake the case upon any such proposition . . . ."

A proposed finding was offered to and refused by the District Court, which would have qualified the Court's finding as to Larson's false proofs establishing his unquestioned priority by a reference to "abandoned experiment or a lack of diligence" (Proposed Finding 27; R. 1113).

Plaintiff's brief renders unmistakable that the settlement of the Larson-Zimmerman Interference was based upon the flat assumption and unqualified conclusion that Larson's proofs were perjured. Plaintiff says:

"In the present case respondent entered into the agreements to secure its property to which it was justly entitled, to-wit, its exclusive property rights

in the Zimmerman wrench inventions involved in the interference. The Larson application, however, was not received by respondent as property which had been taken from it. That application was received only in consideration of the right which respondent gave petitioners to make additional wrenches in lieu of royalties and of the release given by respondent to petitioners as to all civil damages." (Resp. Br. p. 53).

Plaintiff's "exclusive property rights in the Zimmerman wrench inventions involved in the Interference" did not exist if Larson's proofs were true.

The consideration for the settlement, "the right which respondent gave petitioners to make additional wrenches in lieu of royalties" did not exist if Larson's proofs were true.

The consideration for the settlement, "the release given by respondent to petitioners as to all civil damages" did not exist if Larson's proofs were true.

If Larson's proofs were true, Larson and not Zimmerman owned the "inventions involved in the interference".

If Larson's proofs were true he was entitled to the patent on the wrench and had unquestioned right "to make additional wrenches."

If Larson's proofs were true there was no conspiracy between Thomasma and Larson and no "civil damages" inflicted upon Plaintiff.

Indeed, at the time of the settlement, plaintiff held no patents on these wrenches and whatever the state of Larson's proofs he was entitled "to make additional wrenches." His willingness to submit to a covenant to discontinue making wrenches of the type involved in the interference not only constituted an unquestionable admission of the falsity of his proofs, but submission to a restraint that could have been imposed only by some

such overwhelming force as the implicit threat to expose his crime.

Absent Larson's perjury and plaintiff's knowledge of it, there was no occasion for settlement of the interference. Every term of the settlement is premised upon a recognition that Larson's proofs were false and the settlement contract could only have been drafted by one who knew of that falsity.

### **Plaintiff's Analysis of the Opinion of the Circuit Court of Appeals Is Neither Accurate Nor Complete.**

Plaintiff (Br. P. 15-16) breaks down the opinion of the Circuit Court of Appeals into three parts. The first of these states the case without comment (R. 1210-1212). The second, plaintiff says, is "a careful and exact exposition of the facts as to the matters dealt with in the District Court's fact finding and as to the only conclusion upon which the judgment was based, i.e., respondent's unclean hands by reason of its silence", which is the matter at issue in this Court. That part of the opinion covers nine pages (R. 1212-1221), and, plaintiff says, "Throughout these nine pages no reference of any kind is made to the District Court's Memorandum finding that Hobbs had not testified falsely" (Br. p. 16). This positive statement is not true. On page 1216 the Court of Appeals said:

"Hobbs has never seen Thomasma's affidavit, nor any of the interference evidence, and no one at that time had ever told him that Larson and Carlsen had perjured themselves. Larson, Carlsen and Alberts testified that they told Hobbs of the perjury on that day, but Hobbs denied this, and the District Court tells us by this record that Hobbs told the truth." (R. 1216.)

The third part of the opinion, as plaintiff dissects it, dealt with the charges that plaintiff procured the contract in suit by compounding a felony and by coercion, issues



upon which the District Court made no findings, but as to which the District Court refused plaintiff's extensive proposed findings 22-44 (R. 1114-1115). It is with respect to this part of the case alone, plaintiff insists, that the appellate court gave weight to the District Court's statement that "Hobbs did not testify falsely" (Br. p. 16). Plaintiff's position overlooks the appellate court's own statement, quoted above, a statement doubly significant in view of the Court's subsequent conclusions that,

"However, the District Court informs us that Hobbs told the truth, and it is our duty to disregard all other evidence which cannot be reconciled therewith" (R. 1221).

"The District Court did not believe the testimony of Larson, Carlsen or Alberts, or any other witness, where it contradicted Hobbs' testimony, and the latter did not disagree with the testimony of plaintiff's attorneys which related to the same facts" (R. 1222).

"We are convinced that the contradicted testimony of Larson, Carlsen, Alberts and Johnson has no probative value and cannot be considered as substantial evidence in the light of this record" (R. 1223).

Plaintiff insists that the appellate court complied with the mandate of Rule 52a that "due regard shall be given to the opportunity of the trial court to judge of the credibility of the witnesses"; and that the only witness whose credibility was passed on was that of Hobbs (Br. p. 17). It seems superfluous to repeat that a statement that "Hobbs did not testify falsely" is not a finding that his testimony was all credible, and certainly is no such command as the Circuit Court of Appeals read in it, "to disregard all other evidence which cannot be reconciled" with Hobbs' testimony. Yet, upon this statement the Circuit Court of Appeals boldly concludes that the District Court did not believe the other witnesses (R. 1222).

The District Court refused to enter the very findings

from which the Circuit Court of Appeals weaves its opinion (R. 1114-1115). Still the Circuit Court of Appeals ignores all this, ignores the fact that the District Court twice specifically found the testimony in irreconcilable conflict; and cavalierly decides that the District Court discarded defendants' witnesses, believed only those of plaintiff, and then entered findings in support of defendants; but that these findings are without substantial support because the witnesses who supported them, and must have been believed by the District Court, were not believed by the District Court.

If the District Court had found the irreconcilable conflict in the testimony as easily resolved as the Circuit Court of Appeals did, it could very easily have made specific findings with respect to the individual witnesses' credibility. The District Court never attempted this task, and even with respect to Hobbs, whose recollection was admittedly faulty with respect to matters not three weeks old when he testified (R. 627), the Court never passed upon his credibility, but merely exculpated him from a statement in the Court's oral opinion which apparently implied that he had given false testimony.

The inability of the Circuit Court of Appeals to find "substantial evidence" in the record to support the finding of unclean hands is not dependent upon the acceptance of the testimony of any of the witnesses whom the Circuit Court of Appeals discards.

There is no question that neither plaintiff nor its attorneys reported Larson's perjury. Can there be any question that they knew of it? The District Court says that "the proofs establish that the attorneys who concluded the settlement knew before and certainly on December 20, 1940, that Larson knew his interference proofs (which, if they had been true . . . would have proved



priority of invention two or three years earlier than Zimmerman') were insufficient'" (R. 1124). The District Court found that Thomasma's affidavit "disclosed such intimate knowledge (of Larson's early work) as to leave little doubt of the author's knowledge of the facts" (R. 1125), and that plaintiff's "remaining silent after securing the Thomasma affidavit" infected its causes with unclean hands (R. 1125).

The existence of the Thomasma affidavit and its contents are not dependent upon the credibility of anybody's testimony.

The fact that Larson conceded priority is not established by controverted testimony.

The recitals in the proposed and executed contracts are manifest in the documents themselves.

Lindsey's charges that defendants were "holding up the issuance of the Zimmerman patent without the slightest justification" and that, "You must recognize that a large part of the testimony taken on behalf of Snap-On and Larson is, to put it mildly, not the whole truth," do not stand or fall on testimony.

Only Fidler's undisputed statement, that "they had told us Zimmerman was the prior inventor" has a testimonial foundation. But he was one of the witnesses adopted by the appellate court.

All of these very fundamental facts, were of plaintiff's attorneys' authorship, and in the face of them to conclude that the finding of unclean hands is without substantial support in this record constitutes a flagrant violation of the appellate function.

Similarly the Circuit Court of Appeals persists in following plaintiff in refusing to recognize that Alberts, who told Fidler and Wacker that he would withdraw as Larson's counsel if Thomasma's story, which had been dis-

closed to him at that meeting, were found to be true, did actually withdraw as Larson's counsel, although he never filed a formal withdrawal in the Patent Office. Alberts wrote Fidler on December 3, 1940, the letter quoted on page 27 of our principal brief.

On the day preceding the date of that letter Hobbs, as Larson's new counsel, had met with Fidler, leaving no doubt that Alberts had withdrawn as he had proposed to do if he found Thomasma's story confirmed. That alone was substantial evidence of plaintiff's knowledge that Larson's proofs were perjured.

Wacker stated flatly that Alberts had promised to withdraw if he found Thomasma's story confirmed, and did withdraw (R. 523-524, 526-528).

Further substantial evidence that plaintiff knew of Larson's perjury is found in the manner in which counsel for plaintiff sought to resume the interference proceedings on December 18 when the negotiations for settlement broke down. Plaintiff's attorneys served on Alberts a notice that the testimony for Zimmerman would be taken beginning December 23. Five witnesses were named (Def. Exh. 77, R. 1068-1069). These were respectively: Raftery, who had reported the Larson deposition; Mrs. Larson and Mrs. Carlson, wives of Larson and his associate in the Precision Company; Schmid, an office associate of Fidler; and Fidler himself. Fidler attempted to explain why all of these people were named and admitted that he alone was going to testify to the facts as to Zimmerman's early dates (R. 783-785). Of these five witnesses only Fidler knew anything that was relevant to Zimmerman's priority, and the other witnesses were named obviously as an intimation that Larson's proofs were to be vigorously attacked (R. 716-718).

The Circuit Court of Appeals also overlooked the sub-

stantial evidence found in the testimony of plaintiff's president, Wacker, and Wacker's letter of November 5, 1940 (Def. Exh. 11, R. 924-928) reporting Thomasma's revelation at Fidler's home on Sunday evening, November 3. The Court of Appeals, ignoring Wacker's letter, said that Thomasma at that meeting, "asserted that he had given Larson the idea of developing a wrench from the Automotive Wrench, but he disclosed no specific facts with respect thereto" (R. 1214). This discloses a complete disregard of Wacker's letter and particularly the paragraph in the middle of R. 926.

Wacker testified that Thomasma "told us that, from information that he got, we were being framed" (R. 506). Wacker also testified that he "had every reason to believe that it (Larson's testimony) was not the whole truth when Larson conceded priority" (R. 519). Wacker also testified that Alberts "definitely said that, that if Mr. Thomasma's story was substantiated, that he would withdraw as attorney for Precision and Larson. \* \* \* Well, Mr. Alberts had withdrawn from the case at the previous meeting. \* \* \* " (R. 523-524). He repeated this testimony (R. 526-527) and again that Alberts had "said that he would cease to represent them had Thomasma's story proved to be true" (R. 528).

The evidence to support the trial court's findings is not only substantial, but overwhelming.

**Plaintiff's Unnecessary Concern With the Asserted Fairness of the Contracts in Suit Is Uptimely and Presented as a Diversion From the Issue of This Case.**

Plaintiff argues at length the fairness and legality of the contracts in suit, although plaintiff admits (Br. p. 27) that that issue is not before the Court. Defendants' discussion of the terms of those agreements related to the

positive recitals therein as demonstrating knowledge by plaintiff and its attorneys of Larson's perjury, and the excessive restraints therein as evidence, in the light of the other circumstances, of the overpowering compulsion born of the knowledge of that perjury.

Plaintiff repeatedly quotes from that portion of the opinion of the Circuit Court of Appeals relating Hobbs' early negotiations with Fidler, but never quotes the statement, "After receiving Hobbs' letter Fidler notified Hobbs that Automotive wanted a ten per cent royalty" (R. 1216). Obviously that demand, which was finally incorporated in the contract in suit as applicable to any overrun of wrenches beyond the 6000 which defendants were permitted to make (although no patents were issued until more than ~~two~~ years after the settlement), could have been entertained only if defendants were in some manner liable to plaintiff for the manufacture of those unpatented wrenches, and that liability could have accrued only from Thomasma's participation with Larson in devising a wrench during 1938 and later, a possibility in complete contradiction of Larson's interference proofs. If Larson's proofs were true that collaboration was too late to have expressed itself in the development of the wrench on which plaintiff sought to collect ten per cent. Plaintiff could have made the demand only upon realization and recognition that Larson's proofs were perjured.

Plaintiff argues that defendants were "getting the better of the bargain" at the time of the settlement "because the Larson application no longer represented great value to them," because of Larson's development of his new wrench which involved an entirely new principle (Br. p. 25). The Circuit Court of Appeals' opinion also mentions this modified wrench (R. 1220).

This argument begs the question. Larson did develop a wrench fundamentally different and completely foreign to

the concept incorporated in the Larson and Zimmerman patents in suit, but this has not prevented plaintiff from charging infringement of those patents by the manufacture and sale of this completely different wrench. The development of the new wrench, undisclosed to plaintiff at the time of the settlement, certainly could not have influenced the settlement or prompted plaintiff's assertions of the extreme terms incorporated in the settlement agreement. The facts of this later development were not only undisclosed but they are completely irrelevant to the question of Larson's priority and plaintiff's knowledge of it. That defendants knew of the new wrench and saw an avenue of salvation from the extinction which plaintiff thought it was contriving in the settlement, had no influence upon the interference settlement.

Although the Circuit Court of Appeals recognized that Larson built the new accused wrench in the summer of 1941 (R. 1220) the Circuit Court of Appeals also led itself to the absurd statement that, "the defendants continued to operate under the pending application, and raised no question as to Thomasma's joint authorship of Larson's disclosure until March 1, 1943. \* \* \* (R. 1223). The most cursory comparison of the wrench which defendants were selling at the time of the settlement (Phys. Ex. 2) with the new Larson wrench now accused (Phys. Ex. 3) instantly discloses their fundamental differences in construction and principle of operation. Nothing in the Larson application suggested or bore on this new type of wrench until plaintiff inserted the asserted claims 31 and 32 long after Larson had disposed of the application and plaintiff had seen his new wrench (R. 1148-1157).



**Plaintiff's Argument That There Was No Fraud in Larson's Original Patent Application Contradicts Its Conduct During the Settlement or the Interference.**

Plaintiff misconceives the argument with respect to Plaintiff's adoption and prosecution of the Larson patent application to issuance into the patent in suit. That fact is urged, not as a separate ground of error, as Plaintiff presents it, but as another factor in Plaintiff's conduct which the District Court condemned as constituting unclean hands.

Plaintiff sums up its estimate of Larson's contribution (Br. pp. 30-31) by attributing several features of the Larson wrench to Thomasina and then severing this from Larson's contribution in this passage:

"Those were not the features claimed in the original Larson application. The inventive contributions were rather to be found in the manner in which the dial reading was taken on the spring bar (R. 1002); involving the swivelled mounting of the spring member intermediate of its length with the indicator operated through connection with the extremity of that member, the indicator being located at the handle end of the chambered body. *These are the things that were worked out by Larson and covered by his application.*" (Resp. Br. p. 31. Emphasis in Brief.)

It requires no sophisticated analysis of the Larson patent to demonstrate that these things, attributed to Larson by Plaintiff and said by Plaintiff to have been "worked out by Larson and covered by his application", are not the things claimed in the Larson patent either as filed or as issued.

For example, claim 1 as filed (R. 907) contains no reference to any "swivelled mounting of the spring member"; and neither claim 31 nor claim 32 of the issued patent con-

tains any such "swivelled mounting of the spring member" (R. 1156). That claims 31 and 32 contain no such demand is manifest from the fact that these claims are asserted against defendants' present wrench (Phys. Exh. 3), which likewise has no "swivelled mounting of the spring member".

These facts, based upon a comparison of the actual physical models with the Larson patent itself, are not dependent upon the testimony of any of the witnesses, although plaintiff (Br. pp. 30-31) seeks to fortify its argument with a carefully selected fragment from the affidavit of its former traitorous employee, Thomasma. It is impossible to read this affidavit without coming to the conclusion that the Larson application was an expression of the joint work of Thomasma and Larson.

In this same section of its brief plaintiff justifies the covenant of Larson not to contest the validity of the patent to be issued upon his application but fails to mention the fact that the same contract exacted a covenant with respect to the Zimmerman patents which, if Larson's proofs had been true, were Larson's invention.

Plaintiff mentions also that the District Court made no findings upon this issue but fails to mention that the District Court refused plaintiff's proposed findings 7 and 25 (R. 1106, 1113) and a specific finding set forth in plaintiff's "Remarks" (R. 1116), which would have supported plaintiff's present argument.

**Whether or Not There Were Threats, Promises Not to Prosecute, Agreements to Suppress Evidence, It Is Clear That Plaintiff Was Guilty of Unclean Hands.**

Plaintiff chooses to argue at some length an issue that has not been presented in defendants' brief, that of whether or not the interference settlement was procured by

the use of threats or attendant promises not to prosecute and an agreement to suppress evidence (Br. pp. 34-39). The District Court refused plaintiff's proposed findings on these issues and defendants tendered none in view of the District Court's conclusion of unclean hands by virtue of plaintiff's failure to report the perjury (R. 1104-1116).

Plaintiff's protest about the lack of threats is apparently merely an effort to anticipate a realistic appraisal of the character of Lindsey's letter of December 19th (Def. Exh. 68, R. 1048-1050) of which the Circuit Court of Appeals made the statement quoted by plaintiff (Br. p. 34) that these were not direct threats and Alberts' interpretation of them was based upon unwarranted inferences "and were mere products of his imagination." (R. 1222).

The letter charges that a large part of Larson's testimony is, "to put it mildly, not the whole truth" and charges Alberts with "holding up the issuance of the Zimmerman patent without the slightest justification." It also twice warns Alberts that he and his client cannot divest themselves "of all responsibility in this matter." (R. 1049).

Lindsey's attempted explanation of this letter is a semantic excursion which but confirms the fact that a large part of the letter's potency was its deliberate ambiguity (R. 695-698, 706-716). One attorney does not write to another that his proofs are, "to put it mildly, not the whole truth" and assure him "that there are further developments to still be revealed," except either that he has conclusive proof of the falsity of the testimony or, worse still, that he is seeking to exert an improper pressure by capitalizing on a "suspicion" so real that he can safely make the quoted statements.

This Court has observed in *U. S. v. Crescent Amusement Co.*, 323 U. S. (decided Dec. 11, 1944) with respect to



cases involving violations of the Sherman Act, "The crucial facts in each case would be subtle ones as is usually true where purpose and motive are at issue." The purpose and motive of Lindsey's letter are clear. The generality in which the charges are couched was adequate to give Alberts and his client, Johnson, opportunity to read into them their significance and still leave, as was doubtless intended, an opportunity for Lindsey to dispute their intended implications. Lindsey attempts to relate the charges in the letter entirely to Alberts' failure to have Larson's testimony fully transcribed (R. 699) when, in fact, the parties had agreed to suspend transcription while the negotiations were under way (R. 1049).

\* \* \* Zealous advocates have now and then been charged with dishonesty and insincerity, when perhaps they should only have been accused of possessing a childlike credulity. Their "will to believe" had been developed to an abnormal and dangerous degree. \* \* \*

The curious estimate of human credulity often observed in courts of law has perhaps grown out of that phase of advocacy which contends, in at least partial good faith, that an advocate should be prepared to defend or attack either side of any proposition. There are those who are inclined seriously to argue that it is the duty of the lawyer to make the best of whatever disagreeable task may come to him. His weapons are sophistry, subterfuge, plausibility, violent assertion, and that quality of language that conceals thought. But the strangest thing about the performance is that this insincere pleader has himself become a victim of childish credulity. He partly convinces himself that a ridiculous proposition is possibly true. Of all men it is natural to think that the lawyer would have developed the keenest critical sense; but with many members of the profession this is not the fact. They are not qualified to decide what is credible and what is not, and are totally disqualified as scientific investigators. These men have become experts in excuses, apologies, and explanations, and in the process of acquiring their skill they seem to have dulled their judgments as well as their consciences. \* \* \*

Albert S. Osborn, *The Problem of Proof* (2d Ed., 1926), pp. xix-xx, 31-33. Cited in *Cases and Materials On The Legal Profession*, Elliott E. Cheatham, pp. 164.

### **The Authorities Cited by Plaintiff Are Not Pertinent.**

Plaintiff cites a number of cases (Br. pp. 39-41) on the proposition that the knowledge of an agent cannot be imputed to his principal to burden the principal with the consequences of the agent's unclean hands. That may be conceded. In this case the doctrine has no application.

Wacker participated throughout the negotiations and his testimony is more direct than any of his attorneys on his recognition of his knowledge that Larson's proofs were perjured.

Wacker's information was so complete that Fidler wrote him at the time of the settlement—

"I will not go into detail herein regarding matters leading up to the settlement because I believe you are as familiar with them as I am." (Def. Ex. 94; R. 1092.)

It is not necessary to review the facts here to establish that both the attorneys and Wacker enjoyed their "suspicion" by virtue of direct and actual knowledge and not by reason of any legal doctrine of imputation.

Plaintiff next argues that there was no positive, wilful, or intentional wrong by plaintiff or its attorneys and that the doctrine of unclean hands is therefore not applicable. In this case it is perfectly evident that the capable attorneys and the alert Wacker were suffering from no misconception of what course they should pursue or from anything but a deliberate choice that the quickest and most painless way to procure the Larson application and put Precision out of business was the method they chose.

Plaintiff cites *Goodyear Tire & Rubber Co. v. Overman Cushion Tire Co.*, 95 F. (2d) 978. In that case the plain-

tiff had made a contract to compensate an employee for continued services by a percentage of the recoveries in its pending suit in which the employee was an important witness and was about to leave his employment because of plaintiff's insolvent condition. The District Court and the Circuit Court of Appeals both held that there was no culpable conduct and that in fact the employer was put upon by the employee in the erroneous belief that the latter was an important witness in the litigation.

Plaintiff attempts to avoid the consequences of ~~his~~<sup>its</sup> failure to report Larson's perjury by the argument that it could have been charged with unclean hands only if all of the terms of the misprision statute (Title 18, U. S. Code, § 251) were met. This is not a prosecution for violation of that statute and the interpretations of the statute do not bear upon the question whether failure to report the crime by a litigant and his counsel may not be accepted by the trial court as evidence of unclean hands, for which the District Court may deny relief.

Plaintiff is mistaken in insisting that "the question of unclean hands is a matter for the application of local law" (Br. p. 51), as nothing could be more directly related to the law of the forum than the chancellor's concept of what conduct will bar a litigant from the court. Nevertheless, the Supreme Court of Illinois has, in a disbarment proceeding, very well stated the distinction between professional misconduct and violation of the criminal law in this passage from *People v. Macauley*, 230 Ill. 208, 213:

"The standard of personal and professional integrity which should be applied to persons admitted to practice law in the courts is not satisfied by such conduct as merely enables them to escape the penalties of the criminal law."

Plaintiff overlooks the plain terms of the canons of

ethics which state the obvious and unquestionably proper rule applicable to this situation. We have heretofore answered plaintiff's argument that when it procured the assignment of the Larson application and the restraining covenants in the contracts in suit it was recapturing property which had been improperly taken from it. The facts upon which plaintiff makes that argument are premised unmistakably on the conclusion that Larson's proofs were perjured. That argument entirely overlooks the fact that the settlement effected between plaintiff and defendants in this case was not based upon any claim of compensation for liability or restoration of stolen property but was unmistakably an effort on plaintiff's part to take everything necessary to destroy defendants' business and to take it under no other compulsion than plaintiff's knowledge of Larson's crime and under the implied promise not to prosecute the criminals involved.

Plaintiff cites *Marbury v. Brooks*, 7 Wheat. (20 F.28.) 556. That case is not in point as the conveyance sustained by the Supreme Court was voluntarily given by the criminal without the knowledge or participation of his creditors so that there could have been no culpable conduct on their part. Plaintiff does not quote the concluding passage of that opinion (20 U. S. 581):

"This court is of opinion, that in this, the Circuit Court erred, and that the deed is not void, unless Mar-

The Canons of Ethics are more than a beacon for professional guidance. Their history is a long and honorable one. Distinguished counsel and a justice of this Court, David J. Brewer, were the authors (33 Reports of American Bar Ass'n., 57-86, 567-586). They have been enacted into statute (Was. Rev. Stat. Annotated 1932, Sec. 139-15). They have been made rules of court (339 Mo. p. vii; 213 Calif. exili). In Illinois the Supreme Court has held that they "constitute a safe guide for professional conduct in the cases to which they apply, and an attorney may be disciplined by this Court for not observing them." (*Hunter v. Troup*, 315 Ill. 292, 302).

bury acted with the concurrence or knowledge of the banks, or unless they assented to it under some engagement, express or implied, to suppress the prosecution."

Plaintiff's next proposition of law, that to deny plaintiff relief on the ground of unclean hands would make defendants the beneficiary of their own misconduct, and that where "the parties are not *in pari delicto*, equity will give relief to the one that is comparatively innocent," is purportedly based upon *Leo Feist v. Young*, 138 F. (2d) 972.

In that case plaintiff brought suit for copyright infringement and the defense was urged that because plaintiff had failed to comply with a Wisconsin statute forbidding the brokerage of music and requiring direct licensing by the "true or original composer," plaintiff was barred by the doctrine of unclean hands. The Court of Appeals pointed out that powers conferred by the Federal Government cannot be nullified by State legislation and also held that—

"The authorities cited by the District Court are not controlling here because the conduct of the plaintiff in them was fraudulent and directly connected with the issues being litigated, whereas here plaintiff has not been guilty of any inequity, unconscionable act, or wrongdoing towards the defendant." (138 F. (2d) 975.)

The Court then also pointed out that the failure to comply with the State license statute did not interfere with the prosecution of a tort action.

In the case now on review the wrong which the defendants attribute to plaintiff is one directly aimed at defendants and forms the transaction by which plaintiff acquired the Larson patent and the contracts which plaintiff seeks here to enforce. There is a direct relationship between the accused conduct and the rights plaintiff is asserting, as pointed out previously in this brief.

Plaintiff next cites *Woodall v. Peden, et al.*; 274 Ill. 361: In that case plaintiff had been wrongly accused of criminal relations with a granddaughter of plaintiff's wife and executed a deed under that compulsion. Plaintiff's suit was to set aside that deed. The Court granted plaintiff that relief on the ground that plaintiff was comparatively without fault. The statement of facts by the Court leaves it clear that equity was extending itself to redeem plaintiff from a gross imposition upon him, effected by false charge.

The next case cited by plaintiff is *Kapalos et al. v. Ganas et al.*, 242 Ill. App. 302, which involved an agreement between plaintiff and defendant to hold a fictitious foreclosure sale of plaintiff's property to defeat plaintiff's creditors. Some of the defendants and the supposititious purchaser took possession, immediately evicted plaintiff, and refused to convey to the plaintiff, who sued to set aside the pretended foreclosure. The Court held for the plaintiff on the ground that justice would better be served by allowing plaintiff relief than by allowing the defendants to profit by their fraud, basing the decision upon a finding that "Ganas had been guilty of fraud and foisted his scheme upon complainants" (p. 305) and that "the scheme was originated by the defendant, Ganas," (p. 306) and upon the case of *Herrick v. Lynch*, 150 Ill. 283, where, in a similar transaction, defendant was plaintiff's legal adviser and the author of the scheme to defraud. The Court held that it would not permit an attorney to use his power over a client to induce him to enter into a fraudulent contract and then invoke the doctrine of unclean hands against his former client to insure the retention of the profits of the fraud.

The Supreme Court of Illinois has repeatedly relieved plaintiff in spite of his unclean hands where the inequit-



able conduct of which he and defendants were guilty was contrived by defendants and imposed upon plaintiff by virtue of defendants' influence over plaintiff. *Duncan v. Dazey*, 318 Ill. 500, 524-525.

*Herrick v. Lynch* is cited by the Seventh Circuit Court of Appeals with approval in *Ford v. Caspers*, 128 F. (2d) 884, 885, where the Court points out:

"There are a number of Illinois cases recognizing the rule that relief will not be afforded where the parties are *in pari delicto*."

In *Ford v. Caspers*, 128 F. (2d) 884, the Court had a situation comparable in every respect with that in *Kapalos et al. v. Ganas et al.*; 242 Ill. App. 302. Nevertheless, the Circuit Court of Appeals refused the plaintiff relief although it impressed upon defendant the benefits of their joint fraud.

In the examination of all of these cases we are warned against a technical adherence to any formulae that may be deducted from them, as previously pointed out in the Supreme Court's authoritative statement in the *Keystone Driller* case, 290 U. S. 240.

The true rule applicable to this argument is that stated in Pomeroy's Equity Jurisprudence (Third Edition, 1905) Section 403, where the author states the limitation upon the doctrine as a requirement that public policy must be advanced by granting relief to or restoring the plaintiff.

Plaintiff also cites *Carpenters' Union v. Citizens Committee*, 333 Ill. 225, and *Fagan v. Rotherberg*, 320 Ill. 586. In both of those cases the Supreme Court of Illinois decided on the facts that the accused conduct of plaintiff did not affect defendants and, in fact, in the last cited case that the conduct complained of was actually to defendants' advantage.

Plaintiff also argues (Br. pp. 57-62) that the accused

conduct of plaintiff is unrelated to this suit, seeking to distinguish the case from the *Keystone Driller* case, 290 U. S. 240. In that case, although the misconduct of plaintiff was directed to only one patent of five in litigation, this Court held that the patents were related to each other as covering parts of the same machine and that there was therefore a direct relation of plaintiff's misconduct to all of its patents.

In this case the conduct of plaintiff is certainly no less reprehensible than that of the plaintiff in that case. Here the plaintiff is asserting against a single type of wrench three patents which, as applications, were all involved in the interference. The Larson patent was procured in the settlement of that interference and prosecuted to issuance in spite of its corrupt and lawless origin. The right of Larson to any property in the concept embodied in that application is both clouded by the collaboration of Thomasma and the appropriation of the concept from plaintiff. If Larson was in fact the sole inventor of the subject matter of that application, plaintiff never had any claim thereto, and the assignment to plaintiff under the compulsion of the discovery of Larson's perjury condemns plaintiff before this Court. If the Larson patent embodies, as plaintiff contends it does, patent property stolen from plaintiff it is only because that patent incorporates the joint efforts of Thomasma and Larson, and the prosecution of the application as Larson's sole application condemns plaintiff in this Court. *Kennedy v. Hazelton*, 128 U. S. 667, 672.

Similarly, the contract which plaintiff exacted from Larson and Precision to respect the validity of the Larson patent and all claims that might issue therein, and the Zimmerman patents with all claims that might issue therein, in the face of plaintiff's knowledge of the crooked



career of the Larson application places that contract outside the Chancellor's aid.

Were this Court to extend to plaintiff the relief it seeks and close Larson's and Precision's mouths against speaking the truth about the Larson patent, this court would be perpetuating the wrong that began when Larson and Thomasma entered the conspiracy which plaintiff now condemns and the discovery of which enabled plaintiff to procure the Larson patent and the contract in suit.

Relief sought in this case cannot be separated from the Larson patent and the settlement contract, both of which are offered for enforcement in this Court. There is thus an inseparable relation between the objectives of this litigation and the properties which plaintiff procured by its discovery and suppression of the Larson perjury.

### Conclusion.

The conclusion is inescapable that plaintiff has been guilty of unclean hands and that the judgment of the Circuit Court of Appeals should be reversed and that of the District Court affirmed:

Respectfully submitted,

WILL FREEMAN,

CASPER W. OOMS,

*Attorneys for Petitioners.*

Chicago,  
January 27, 1945.

